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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN RUSH McCOY, Defendant and Appellant.	G049184 (Super. Ct. No. M13757) O P I N I O N

Appeal from an order of the Superior Court of Orange County, John L. Flynn, Judge. Affirmed.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found true that defendant Steven Rush McCoy was a sexually violent predator (SVP) within the meaning of the Sexually Violent Predators Act (Act). (Welf. & Inst. Code, § 6600 et seq.) The trial court committed defendant to the Department of Mental Health (now called the Department of State Hospitals) for an indeterminate term.

Defendant contends the court prejudicially erred in allowing the prosecution's expert witnesses to rely on uncharged allegations of sexual assaults. We disagree and affirm the order.

FACTS AND PROCEDURAL BACKGROUND

In 1990, defendant gained entry in the home of 11-year-old Lisa H. by pretending to be a delivery person. Holding a box, defendant knocked on the door and Lisa H., who was sick and home alone, answered. Defendant requested a glass of water, claiming something in the box was burning. The box contained a child's doctors kit, along with a sheet and a change of clothing. While threatening Lisa H. with a knife, defendant entered the home, laid out the sheet in a bedroom, and told her to undress. She complied. Defendant left the room and returned naked. He kissed her entire body, digitally penetrated her, and raped her. Before leaving, defendant threatened to hurt her if she told anyone. After he left, Lisa H. called her mother. Defendant pleaded guilty in 1991 to forced oral copulation, forced lewd and lascivious acts with a child under the age of 14, sexual penetration, and rape by force.

Proceedings to commit defendant as an SVP commenced in 2010. The prosecution presented the expert testimonies of two psychologists, Dr. Charles Flinton and Dr. Kathleen Longwell.

As part of their evaluations, both experts considered an uncharged sexual offense (1981 incident) involving 8-year-old Louise B. and 12-year-old Jayne S. The

girls were playing in the schoolyard when defendant, who lived near the school, gave them $5 to climb over the fence and enter his house. Once inside, he told them to undress and lie on a bed. As they did so, he left the room and returned nude. He then rubbed his penis on their legs and ejaculated. Thereafter, he then washed them with a wash cloth and let them leave. Although the girls reported the incident to the school, defendant was not charged.

The experts diagnosed defendant with pedophilia, alcohol dependence, and bipolar disorder, which predisposes him to commit predatory sexual acts. Based on his past behavior and risk level, the experts opined defendant is likely to engage in sexually violent predatory acts if released, making him a danger to the health and safety of others.

DISCUSSION

Defendant contends the court erred in allowing the prosecution's experts to rely and refer to the 1981 incident. We disagree.

1. Background

Prior to trial, defendant moved in limine to exclude evidence of uncharged sexual offenses, including the 1981 incident. Defendant argued the evidence of the 1981 incident was unreliable because it consisted of only (1) a 1981 one-page cover sheet of a police report; (2) a probation and sentencing report from 1991; (3) a 1991 interview by police of Louise B.; and (4) transcripts of testimony from his 1991 sentencing hearing, including that of Louise B., during which she detailed the facts of the incident and identified him as the perpetrator of the 1981 incident, as well as his own, in which he denied knowledge or participation in the 1981 incident.

According to defendant, all of these items contradicted each other in terms of whether the 1981 incident involved two girls and a boy, two girls, or three girls,

whether defendant used money to gain entry into their home or whether he did so to entice them to enter his house. Defendant noted the 1981 police report only identified him as a suspect, listed the names of the victims and their ages, and described the crimes and did not explain why he was a suspect. He testified he was working and would have been out of the house at the time of the incident. In fact, he did not know he was a suspect and was never investigated or charged with an offense. He argued, "the only indication we have as to why they [did not] follow up with it is supposedly a hearsay statement made by one of the officers who testified at the hearing who says Louise [B.'s] mother didn't want to" because she did not want her daughter to "go through that." Defendant further urged the court to discredit the 1991 police interview of Louise B. and her 1991 testimony at the sentencing hearing because both occurred 10 years after the incident and were inconsistent with the probation and police reports. Additionally, defendant claimed Louise B.'s in court identification of him at the sentencing hearing was "very weak" because she had identified someone else in the photo lineup and anyone "walking into [the] courtroom knows who the defendant is."

In response, the prosecutor asserted defendant had, and did, cross-examine the witnesses at the sentencing hearing, who testified under oath, and also hired an investigator who testified for defendant. As to which home the victims entered, the prosecutor noted the phrase "'their home'" could have been a misstatement that could be clarified in her testimony. The prosecutor further argued the facts of the incident as reflected by Louise B.'s sentencing testimony and the reports were "substantially similar": defendant lured the victims to a home next to a playground by promising them money if they climbed over the dividing fence and entered the home. Once inside the home, defendant rubbed his penis on their legs while they were naked from the waist down.

The court found that "despite some inconsistencies," the evidence was reliable. The police report identified Louise B., and defendant, his date of birth, and his

address. Similar, although not identical, information was contained in the 1991 probation report. There was also the 1991 sentencing hearing at which defendant was provided due process. Multiple witnesses testified, including the police officers who followed up on the 1981 incident and Louise B., who, among other things, identified defendant under oath as the person who molested her. Defendant had a chance to cross-examine these witnesses and testified himself. Based on this "substantial amount of information," the court concluded the evidence had "a high degree of an indicia of reliability" and "that there were due process protections in place."

The prosecution's experts both relied on the 1981 incident to diagnose defendant with pedophilia. Flinton further described the incident in detail to the jury while both experts acknowledged defendant denied committing the offense.

2. Analysis

Defendant argues the evidence from 1991 "was suspect, lacking reliability and, given the passage of time between the alleged incident in 1981, sentencing ten years later in 1991 and the SVP hearing in 2013, [he] was prevented from contesting the truth of [Louise B.'s] identification of [him] as her and [Jayne S.]'s assailant." We are not persuaded.

Evidence Code section 801, subdivision (b) limits expert opinion testimony to an opinion "[b]ased on matter . . . perceived by or personally known to the witness or made known to [the witness] at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which [the expert's] testimony relates . . . ." Thus, expert testimony may be "premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions." (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) Once the "threshold requirement of reliability is satisfied, even matter that is ordinarily *inadmissible* can form the proper

basis for an expert's opinion testimony. [Citations.] And because Evidence Code section 802 allows an expert witness to 'state on direct examination the reasons for his opinion and the matter . . . upon which it is based,' an expert witness whose opinion is based on such inadmissible matter can, when testifying, describe the material that forms the basis of the opinion." (*Ibid*.)

"Because an expert's need to consider extrajudicial matters, and a jury's need for information sufficient to evaluate an expert opinion, may conflict with an accused's interest in avoiding substantive use of unreliable hearsay, disputes in this area must generally be left to the trial court's sound judgment." (*People v. Montiel* (1993) 5 Cal.4th 877, 919.) We review the trial court's ruling for abuse of discretion. (*People v. Bell* (2007) 40 Cal.4th 582, 607-609; *People v. Nicolaus* (1991) 54 Cal.3d 551, 582-583.)

Unlike *People v. Dodd* (2005) 133 Cal.App.4th 1564, upon which defendant relies, no abuse of discretion has been shown in this case. *Dodd* held that a reference in a parole report to the defendant's molestation of a young girl was unreliable hearsay that could not be considered by experts in forming their opinions as to whether the defendant was a mentally disordered offender. (*Id*. at pp. 1570-1571.) According to *Dodd*, a parole report was not the equivalent of a probation report because it failed to "describe the factual circumstances of the criminal offense, the defendant's prior record, statements by the defendant to the probation officer, and information concerning the victim of a crime." (*Id*. at p. 1570.) Here, in contrast, the court based its decision on its review of materials that collectively provided this data.

Defendant repeats the arguments he made at the hearing on his motion in limine, which goes to the weight of the evidence and not admissibility. We decline to reweigh the evidence. Defendant has not shown the court "clearly abused" its discretion. (*People v. Bui* (2001) 86 Cal.App.4th 1187, 1196.) Because evidence exists to "support the court's ruling, disputed or not, we will affirm the court's order." (*People v. Rubics* (2006) 136 Cal.App.4th 452, 462.)

DISPOSITION

The order is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.